

MILLENNIUM CHALLENGE CORPORATION'S SHUTDOWN CONTINGENCY PLAN APRIL 7, 2011

1. Overview

The Office of Management and Budget (OMB) requires all agencies to have a shutdown plan in the case of a lapse, or hiatus, in appropriations. This plan for the Millennium Challenge Corporation (MCC) provides the legal background, overarching principles, and specific list of excepted personnel pertaining to an orderly shutdown while continuing select operations in conformance with applicable laws and regulations.

Of the approximately 285 staff currently on-board, MCC's plan includes retaining:

- a. MCC's CEO (as well as private sector members of the Board of Directors) as Senate-approved political appointees
- b. 16 staff to conduct the orderly shutdown of operations (temporarily excepted for four hours, though travel arrangements to ensure the safe return of MCC personnel traveling abroad may take longer)
- c. Two employees at headquarters and 19 Resident Country Directors (RCDs) overseas responsible for public safety or the protection of property, including grant assets abroad, and to perform MCC's corollary responsibility to assist in diplomatic relations in those countries where multi-year funded compacts exist and are being developed (excepted up to the duration of the shutdown)
- d. 20 employees responsible for the continued operation of multi-year funded programs (excepted up to the duration of the shutdown)
- e. Depending on the timing of the shutdown relative to MCC's Quarterly Disbursement Request Package (QDRP) approval process, 19 additional personnel responsible for the continued operation of multi-year funded programs (temporarily excepted during the period required to complete QDRP approvals)

Section 4 below provides detailed lists of personnel in each of these categories.

2. Legal Background

Government agencies have no authority to incur obligations or make expenditures that cannot lawfully be funded from existing or prior appropriations. Legal authority for this concept stems from both the Constitution and a statute entitled the Antideficiency Act (ADA). The ADA (31 U.S.C. §1341) prohibits all officers and employees of the federal government from entering into obligations in advance of appropriations and prohibits employing federal personnel except in emergencies, *i.e.* those involving the safety of human life or the protection of property (31 U.S.C. § 1342). In addition, the ADA prohibits agencies from accepting voluntary services. As a result of lapses in appropriations over the years, the Attorney General and the Department of Justice's Office of Legal Counsel (OLC) issued opinions and described circumstances when agencies may continue operations, even when there is a lapse in appropriations. These exceptions include activities funded with appropriations that do not expire at the end of the fiscal

year, that is, multiple year and “no-year” appropriations, and activities authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency. Also, these opinions and OMB guidance set forth categories of “excepted” personnel who may continue to function during all or part of a shutdown. These consist of (a) Senate-approved political appointees, who are not subject to the ADA; (b) personnel conducting the orderly shutdown of operations (who are temporarily excepted); and (c) pursuant to 31 U.S.C. § 1342, agency employees responsible for public safety or the protection of property (who are excepted as long as the individual employee is required for the safety and/or protection function).

MCC has the legal authority to continue its operations even during a lapse in appropriations to the extent its programs are funded with no-year appropriations, which have largely been obligated. The main constraint is that MCC relies on annually appropriated administrative funds to pay its staff and other administrative expenses. In the absence of available appropriations to continue paying staff during a lapse in appropriations, MCC will need to furlough non-excepted employees and reduce operations accordingly. However, the OLC’s opinions discussed above make it clear that the “necessary implication” exception to the ADA would authorize MCC to require an appropriate number of employees to work during a lapse in appropriations to administer the programs funded with no-year appropriations. The key to this exception is that the annually funded employees must be directly connected to the continuation of the multi-year funded program. Consequently, while MCC’s previously funded compact programs may continue despite a lapse in appropriations, such a lapse will limit operations and staffing to those employees necessary to administer the no-year funded programs. Specifically, MCC’s interpretation of OLC’s guidance as to how to determine whether to continue to administer no-year funded programs and how many employees are necessary for this function indicates that the justification for excepting employees from a lapse in appropriations furlough must be based on a congressionally authorized or appropriated function for which Congress has provided funding that remains available during the lapse, where the suspension of the related activity (during the funding lapse) would prevent or significantly damage the execution of the terms of MCC’s statutory authorization or appropriation. Pursuant to the Millennium Challenge Act, (the “Act”) Section 609(j), the duration of MCC’s compacts may not exceed five (5) years. Almost all of the existing nineteen compacts are in the midst of implementation. Any delay in the implementation process is likely to cause these compacts to miss the five year completion date, resulting in incomplete projects at the end of the compact term and a waste of previously invested taxpayer dollars. When employees are designated as necessary for public safety and the protection of property, a similar justification is required. There must be some clear connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised to some degree by a delay in the performance of the function in question.

3. Principles of MCC’s Plan

A shutdown notwithstanding, MCC will continue to disburse prior compact obligations, which are fully funded from past appropriations, to the extent quarterly project funding has been approved and excepted staff can provide sufficient oversight. This is consistent with OMB’s 1980 guidance on work that should continue during a lapse in appropriations, including “the performance of contract obligations under no-year or multi-year or other funds remaining

available for those purposes.” Moreover, an interruption in compact disbursements to MCAs and their contractors/vendors could breach contract provisions and undermine ongoing projects, in particular by adding schedule and cost risks for time-constrained compacts.

Following the orderly shutdown of non-excepted operations, MCC will retain as excepted personnel throughout any furlough period the minimal number of personnel to ensure the safety of staff and protection of property, including grant assets overseas, and to provide essential oversight of existing compacts. MCC estimates needing our (Senate-approved) Chief Executive Officer and 22 employees at headquarters; given our small size, this number is approximately 9% of current staffing in Washington. In addition, MCC’s excepted personnel will need to include the Resident Country Director in each of our 19 existing compact countries (subject to State Department concurrence on excepted personnel at overseas missions) given their critical oversight role for MCC’s multi-year compact funds and grant assets, and to perform MCC’s corollary responsibility to assist in diplomatic relations in those countries where multi-year funded compacts exist and are being developed. Section 4 below provides a detailed list of MCC’s proposed excepted personnel.

Depending on the timing of any furlough, MCC will need to make a temporary exception for the minimal number of additional staff required to approve quarterly compact disbursement requests from the MCAs. This is an essential component of MCC’s oversight of past obligations for our compacts. Section 4.e. below provides a description of the preparations and plans to minimize this requirement while ensuring due diligence in reviewing and approving quarterly disbursements. Also, in the case of an extended lapse in appropriations, MCC may designate different employees as excepted from the furlough in order to meet the needs of managing multi-year funded compact programs.

4. MCC Personnel during a Lapse in Appropriations

- a. Senate-approved political appointees:
 - i. MCC’s Chief Executive Officer (CEO)
 - ii. Private Sector Members of MCC’s Board of Directors¹

Consistent with OMB and OLC guidance on excepted personnel, MCC’s plan includes:

- b. 16 personnel conducting the orderly shutdown of operations (temporarily excepted):
 - i. Administrative Services & Human Resources Managing Director to ensure proper communication to MCC’s workforce and oversee subordinate personnel processing (estimated four hours)
 - ii. One Human Resources specialist to process personnel (furlough) actions and submit timekeeping records (estimated four hours and then on call for any subsequent actions changing personnel’s furlough status)
 - iii. Contracts & Grants Management Managing Director and approximately ten contracting personnel, including federal warranted contracting officers and

¹ MCC’s Public Sector Board Members will be covered by their agencies’ plans. MCC will designate the private sector board members as excepted in the event the board is required to vote on a matter.

- contractor support staff, for the orderly suspension of non-excepted contracts (estimated four hours)
- iv. Administration & Finance Managing Director in charge of shutdown plan development and implementation (estimated four hours)
 - v. Travel Manager and one contract staff to ensure the safe return of MCC personnel traveling abroad (until all such arrangements are complete)
- c. Two employees (with two more on call if needed) and 19 Resident Country Directors (RCDs) responsible for public safety or the protection of property (excepted up to the duration of the shutdown):
- i. Security Director for staff security and public safety, as well as to assist with communications with furloughed staff
 - ii. Chief Information Officer to ensure continued operation of essential telecommunications systems and oversee excepted IT contractors
 - iii. All 19 RCDs to help safeguard grant assets in their respective countries (pending State Department concurrence on excepted personnel at overseas missions)
 - iv. Overseas Administration Director on call for any issues related to overseas personnel
 - v. Administrative Services Associate Director on call for any issues related to property in the headquarters buildings
- d. 20 employees responsible for the continued operation of multi-year funded programs (excepted up to the duration of the shutdown):
- i. Two Office of the CEO staff members critical to assist the CEO in the performance of his duties
 - ii. VP for Administration & Finance and one staff member for administrative guidance and support to multi-year funded programs
 - iii. Financial Management Managing Director and one staff member for ongoing financial requirements
 - iv. Contracts & Grants Management (CGM) Managing Director to oversee excepted contracts and two CGM contractors
 - v. VP for Compact Operations and seven staff members (two for each region plus one from Technical Services) for the continued operation of multi-year funded compact programs
 - vi. General Counsel and one staff member to manage legal and regulatory issues (as well as any Board communications) regarding multi-year funded programs
 - vii. VP for Policy & Evaluation and one staff member to address international policy issues involving compact or threshold countries
 - viii. VP for Congressional & Public Affairs to manage congressional relations issues during this period
- e. 19 personnel responsible for the continued operation of multi-year funded programs (excepted during the period required to complete Quarterly Disbursement Request Package approvals):

All compact countries submit QDRPs (in the month preceding the start of the next quarter) for MCC's approval. In the event of a shutdown before MCC approves all QDRPs, a core group of temporarily excepted personnel would complete any pending QDRP approvals. MCC would consider these staff as part of process to ensure no-year funded compact programs could continue despite the furlough of most MCC staff. Depending on the number of QDRPs remaining, this core group would comprise up to the following personnel:

- i. Regional Managing Directors (3)
- ii. Senior Directors for ESA, Fiscal Accountability & Procurement, and Infrastructure in each Region (9)
- iii. Technical Service Senior Directors for Ag / Land, Gender, Private Sector, and Education/Health (4)
- iv. Financial Management and QDRP validation staff (2)
- v. One transaction attorney to review QDRPs as necessary

If all or most QDRPs are completed in advance of any shutdown, the number of these temporarily excepted personnel would be reduced accordingly.